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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1370.

ALEXANDER H. LINDSAY,

Appellant,

v.

JOSEPH J. KELLEY, JR.,
Secretary of the Commonwealth of Pennsylvania,

Appellee.

On Appeal From the Supreme Court of Pennsylvania.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON BEHALF OF THE PENNSYLVANIA BAR ASSOCIATION IN SUPPORT OF MOTION TO DISMISS AND BRIEF *AMICUS CURIAE.*

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INDEX.

	Page
Motion for Leave to File a Brief *Amicus Curiae* on Behalf of the Pennsylvania Bar Association in Support of Motion to Dismiss	i
Statement	1
A. History of Constitutional Reform in Pennsylvania	2
B. The Present Lawsuit	7
Argument	12
A. The Appeal Should Be Dismissed at the Earliest Possible Moment	12
B. The Appeal Should Be Dismissed for Want of a Substantial Federal Question	13
1. "Ex Office Delegates" (Jurisdictional Statement pp. 13-15)	13
2. "Judicial v. Legislative Supremacy" (Jurisdictional Statement pp. 15-17)	14
3. "Abrogation of Pennsylvania Constitutional Protections" (Jurisdictional Statement pp. 17-20)	17
Conclusion	18

TABLE OF CITATIONS.

Cases: Page

Baker v. Carr, 369 U. S. 186 (1962) 13, 14
Beck v. Washington, 369 U. S. 541 (1962) 15
Byrd v. Blue Ridge Rural Electric Cooperative, 356 U. S. 525 (1958) 16
Carfer v. Caldwell, 200 U. S. 293 (1906) 17
Chicago, M. St. P. & Pac. R. R. v. Risty, 276 U. S. 567 (1928) 18
Dreyer v. Illinois, 187 U. S. 71 (1902) 17
Fortson v. Morris, 385 U. S. 231 (1966) 13, 14
Gray v. Sanders, 372 U. S. 368 (1963) 13
Hebert v. Louisiana, 272 U. S. 312 (1926) 18
Lucas v. Colorado General Assembly, 377 U. S. 713 (1964) 13
Ohio v. Akron Park District, 281 U. S. 74 (1930) 16
Reynolds v. Sims, 377 U. S. 533 (1964) 13
Stander v. Kelley, 432 Pa. 1 (1968) 9
Stander v. Kelley, 433 Pa. 406 (1969) 10
Wesberry v. Sanders, 376 U. S. 1 (1964) 13
Winters v. New York, 333 U. S. 507 (1948) 18

Constitutions: Page

Pennsylvania Constitution of 1874, Article XI, Section 1 2
U. S. Constitution, Fourteenth Amendment 10

Statute: Page

Act No. 2 of 1967 Session of Pennsylvania Legislature Adopted March 15, 1967 ..... 4, *et seq.*

Authority: Page

Stern & Gressman, Supreme Court Practice p. 99 (3d ed. 1962) 15

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON BEHALF OF THE PENNSYLVANIA BAR ASSOCIATION IN SUPPORT OF MOTION TO DISMISS.

The Pennsylvania Bar Association respectfully requests leave to file a brief *amicus curiae* in support of the motion to dismiss in this proceeding. The brief *amicus curiae* is submitted with this motion.

The basis for the request is as follows. The Pennsylvania Bar Association has been the principal moving force in achieving constitutional reform in the Commonwealth

of Pennsylvania. As shown by the attached brief (pp. 2-7), the whole concept of constitutional revision which has now been overwhelmingly endorsed by the voters of the Commonwealth was initiated by the Pennsylvania Bar Association and brought to this successful conclusion with the aid of many other groups. The Pennsylvania Bar Association has participated in this proceeding, brought by disappointed opponents of constitutional reform, in the Pennsylvania courts and requests leave to continue that participation before this Court in order that the full history of the constitutional reform may be made available for the Court's consideration.

Respectfully submitted,

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June 6, 1969.

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ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE PENNSYLVANIA BAR ASSOCIATION IN SUPPORT OF MOTION TO DISMISS.

STATEMENT.

Pursuant to Rule 42 of the Rules of this Court, the Pennsylvania Bar Association submits this Brief *amicus curiae* in support of appellee's Motion to Dismiss. As will appear from the History set forth below, the Pennsylvania Bar Association is vitally interested in the outcome of this proceeding.

A. History of Constitutional Reform in Pennsylvania.

The surge of constitutional reform, which has been so rampant throughout the twentieth century in most of the states in this country, was long overdue in reaching the Commonwealth of Pennsylvania. For over 90 years, Pennsylvania operated under constitutional provisions drafted by a Convention which concluded its work in 1873. These provisions, which went into effect on January 1, 1874, were highly restrictive in nature and largely unimaginative. With the population explosion, the growing complexity of industrial and commercial life, and the other developments of the Twentieth Century, the need for a complete overhaul of this Nineteenth Century document became apparent. But the people of Pennsylvania were unwilling to authorize the holding of an unlimited constitutional convention. On six separate occasions since January 1, 1874, the Pennsylvania Legislature submitted to the voters the question whether a constitutional convention should be called. Elections on this question were held in November 1891, in September 1921, in November 1924, in September 1935, in November 1953 and in November 1963. On each of these occasions, the question was rejected.

Thus, while the need for a general revision of this product of the horse and buggy age was becoming more and more pressing, it was apparent by the early 1960's that the constitutional convention route was not the one to follow.

Accordingly, the Pennsylvania Bar Association embarked upon "Project Constitution," an endeavor to overhaul the Pennsylvania Constitution on an article by article basis.[1]

1. Article XI, Section 1 of the Pennsylvania Constitution of 1874 provided that amendments would go into effect if adopted by two sessions of the legislature and then approved by the voters.

In 1963, the Pennsylvania Bar Association drafted 12 article by article amendments which, if adopted, would have completely modernized Pennsylvania's Constitution. These were introduced into the Pennsylvania Legislature in March 1963, but were shunted aside by the legislature at that time in favor of a bill calling for the sixth referendum on the question whether a Constitutional Convention should be held.

After the defeat of that question at the November 1963 election, the 12 proposed amendments were re-introduced at the 1964 session of the Pennsylvania Legislature. The 1964 Legislature adopted two of the amendments.[2] The 1965 session of the Legislature again adopted these two amendments and they came before the people at the 1966 elections—one in May and one in November—and were adopted by comfortable majorities.

In 1965, nine of the remaining 10 amendments were again introduced into the Legislature. Four of these amendments were adopted for the first time by the 1965 Session.

The Bar Association's amendments were again introduced into the 1966 Session (together with two supplemental amendments). The 1966 Legislature adopted for the first time three more of our amendments.

The seven amendments thus approved by the 1965 and 1966 Legislatures[3] were again adopted in the early days of the 1967 Session of the Legislature. They were submitted to the people at the May 1967 Primary Election at which time they were approved by the electorate.

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2. These amendments dealt with Public Officers and Private Corporations.

3. These amendments revised Articles relating to the Bill of Rights, the Legislature, Legislation, the Executive, Elections, and Future Amendments, and repealed in its entirety an obsolete Article on Railroads and Canals.

As a result of the foregoing, the Pennsylvania Constitution had been overhauled in all but four areas. These were Legislative Apportionment, the Judiciary, Taxation and State Finance, and Local Government.

As to these four crucial and highly controversial areas, a new approach was adopted by Governor Raymond P. Shafer. He urged legislation to authorize submission to the electorate at the May 1967 Primary of the question whether a limited Constitutional Convention should be called which would deal with these subjects and would submit proposals back to the voters for their approval.

The Pennsylvania Legislature complied with the Governor's request and, on March 15, 1967, adopted Act No. 2 of the 1967 session. The Act provided that, at the Primary Election to be held in May 1967, the following question would be submitted to the electorate:

> "Shall a constitutional convention be called in accordance with, and subject to, the limitations and requirements contained in Act Number 2 of the 1967 Session of the General Assembly, to prepare for submission to the electorate proposals for the revision of the subject matter of any amendment proposed, but not approved, at the May 1967 Primary and for the revision of Sections 16, 17 and 18 of Article II and of Articles V, XIII, XIV, XV and IX (excluding Section 18 and the Uniformity Clause of Section 1 of Article IX as provided in Section 7(B) of this Act)?"

Act No. 2 also provided the framework within which the Convention, if called, would act. It specified in Section 2 that, if a majority of the electors favored the holding of the limited Constitutional Convention, the Convention would consist of 163 delegates—150 elected district delegates and 13 ex-officio delegates who would have the powers of elected

delegates.[4] Sections 3 and 4 of the Act provided for the nomination and election of the district delegates. Section 5 contained provisions for a Preparatory Committee which would make arrangements for the Convention. Section 6 provided that the Convention would be in session from December 1, 1967 to February 29, 1968 and specified the nature of its organization. Section 7 set forth the substantive powers of the Convention and the limitations on those powers. Sections 8 and 9 prescribed the manner in which the Convention would submit its proposals to the electorate. Section 10 related to expenses of delegates, and Section 11 to registration of lobbyists. Section 12 provided that Convention sessions would be open to the public. Section 13 contained the effective date of the Act.

Between the passage of Act No. 2 on March 15, 1967 and the Primary Election held on May 16, 1967, there was widespread public discussion in Pennsylvania of the whole matter of amending the Constitution, with airing of positions, pro and con, on every conceivable aspect of the matter.

On May 16, 1967, the calling of the limited Constitutional Convention was approved by the voters.

In the summer of 1967, the Preparatory Committee held widely-publicized hearings at which interested organizations and persons submitted their views with regard to the various subjects with which the Convention would deal.

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4. The ex-officio delegates specified in Section 2 of Act No. 2 were to be the Lieutenant Governor, the President Pro-Tempore of the Senate, the Majority Leader of the Senate, the Majority Whip of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Leader of the House, the Majority Whip of the House, the Minority Leader of the House, the Minority Whip of the House, and the Minority Caucus Chairman of the House.

Keeping the matter further in the public limelight was the election of the district delegates in November of 1967.

True to the mandate of Act No. 2, the Convention went into session on December 1, 1967, and continued in session until February 29, 1968. From the inception of the Convention until its conclusion, the Convention's deliberations and proceedings were held under the glare of publicity.

When the Convention concluded its deliberations, it came forth with a set of proposals which, while falling short of the reform objectives of many groups (including the Pennsylvania Bar Association), were nevertheless a vast improvement over what had existed before. For example, the Convention proposed a new Judiciary Article which established a system of merit retention (but not merit selection) of judges, provided for unification and centralized administration of Pennsylvania's court system, set up procedures for removal, suspension, discipline and compulsory retirement of judges, and made some major improvements in Pennsylvania's minor judiciary (although it failed to abolish the anachronistic Justice of the Peace system).

Acting in accord with the provisions of Sections 8 and 9 of the authorizing legislation, the officers of the Convention certified the Convention proposals to the Secretary of the Commonwealth, the Secretary advertised the proposals in at least two newspapers of general circulation in every county of the Commonwealth during the first week of April 1968, and the recommendations of the Convention were submitted to the electors for their approval or rejection on a separate ballot at the Primary Election held in April 1968.

The Convention's proposals were well publicized. Thousands of column inches of print were devoted to the Convention's work in newspapers throughout the State. The specific text of the final proposals was repeatedly placed

before the public, together with a multitude of analytical articles, comments, and editorials which explored every aspect of those proposals. Heavy emphasis was placed on the proposals with regard to the Judiciary Article.

Between March 1, 1968 and April 23, 1968 (the date of the Primary), the Voters' Guides of the League of Women Voters (which reach more than 2,500,000 voters in the Commonwealth of Pennsylvania) published the text of each of the Convention's proposals. In addition, the League distributed over a half million separate flyers obtained from the Convention itself, containing all of the proposals. Other public service groups engaged in similar activities. A specially-chartered corporation called "A Modern Constitution for Pennsylvania, Inc." distributed several hundred thousand flyers containing the text of the proposals. Approximately three million pamphlets containing the full text of the proposals were distributed throughout the public schools of the Commonwealth to be taken home by the school children for their parents.

At the Primary Election on April 23, 1968, the eligible voters of Pennsylvania approved all of the proposals of the Convention.

B. The Present Lawsuit.

On April 11, 1968, Irvin Stander and Alexander H. Lindsay, filed a taxpayers' Complaint in Equity against appellee, the Secretary of the Commonwealth of Pennsylvania, in which they sought to enjoin a vote by the electorate on the proposed Constitutional amendments R. 1a-8a).[5] The plaintiffs, in their Complaint, asserted that the proposed amendments were invalid for the following reasons:

5. "R" references are to the printed Record in the Supreme Court of Pennsylvania at No. 3, May Term 1969.

1. The amendments were violative of a provision of the Pennsylvania Constitution of 1874, which prohibits the submission of amendments more frequently than once in five years (Complaint, paragraph 5-6).

2. The qualified electorate of the Commonwealth had not been afforded an adequate opportunity to study and contemplate the proposed amendments because the amendments were not formally published until 18 days before the election and because events of "international magnitude"—the assassination of Dr. Martin Luther King, Jr., and the limited emergency conditions in Philadelphia and Pittsburgh—had intervened between March 1, 1968 and the date of the Primary Election (Complaint, paragraphs 7-8).

3. The provision of Section 8 of the enabling Act providing for advertisement of the Constitutional Convention's proposals during the first week in April 1968 was violative of a provision of the Pennsylvania Constitution of 1874 which provided for advertisement of proposed Constitutional amendments three months before the next general election (Complaint, paragraph 9).

4. The titles of certain of the proposed Constitutional amendments, as they appear on the Primary Election ballot, inadequately described the proposals, are misleading and are, therefore, "contrary to the laws of the Commonwealth and conscience" (Complaint, paragraph 10).

5. The proposal relating to the new Judiciary Article "is contrary to and violative of the constitutional guarantees of the separation and balance of legislative and judicial powers by effectively eliminating from the

courts of the Commonwealth all constitutional power." (Complaint, paragraph 11).

6. Act No. 2 of the 1967 session of the Pennsylvania Legislature was in itself an attempt to amend the Pennsylvania Constitution by providing a method of amending the Constitution not contemplated by the present Constitution (Complaint, paragraph 12).

The Complaint itself made not a single reference to the Constitution of the United States or any questions arising thereunder.

On April 11, 1968, the Court of Common Pleas of Dauphin County denied plaintiffs' prayer for a preliminary injunction (R. 9a-12a). The Supreme Court of Pennsylvania affirmed, holding that the Common Pleas Court had not abused its discretion in denying the requested preliminary injunction. **Stander v. Kelley**, 432 Pa. 1 (1968).[6]

Upon remand of the case to the Court of Common Pleas of Dauphin County, plaintiffs filed an amended Complaint (S. 4a-12a).[7] This time, however, plaintiffs directed their attack only at the new Judiciary Article of the Pennsylvania Constitution; they dropped their attack against the other four proposals. However, their claims of invalidity were, with two additions, identical to the claims that had been made before. These were that the Convention had not followed proper procedure in adopting certain provisions of the new Judiciary Article (Amended Complaint, paragraph 4) and that the new Judiciary Article was "beyond the scope of the convention's powers" (Amended Complaint, paragraph 9).

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6. Reprinted at pp. 28a-40a of the Jurisdictional Statement.

7. "S" references are to the printed Supplemental Record in the Supreme Court of Pennsylvania at No. 38, May Term 1969.

Once again, there was not a single reference in the Amended Complaint to the Constitution of the United States or any questions arising thereunder.

On November 26, 1968, the Court of Common Pleas of Dauphin County dismissed the Amended Complaint and entered judgment in favor of defendant-appellee (S. 17a-30a). The Supreme Court of Pennsylvania affirmed. **Stander v. Kelley**, 433 Pa. 406 (1969).[8] The Court held that the procedure followed—the calling of a limited Constitutional Convention pursuant to a mandate of the electorate and the approval of the proposals of the Convention by the electorate—was a perfectly permissible method of amending the Pennsylvania Constitution, that the Convention acted properly and within its authority, that the notice and advertisement of the Convention proposals were timely and adequate, that the electorate had ample opportunity to study and contemplate the proposed amendments, that the ballot was not misleading, and that the new Judiciary Article was in no sense violative of any Constitutional guarantees of separation of legislative and judicial powers. The Court also dismissed a contention raised by plaintiffs in their Brief and argument (but not in their pleadings) that the existence of non-elected delegates to the Convention was somehow violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

One of the plaintiffs has now appealed to this Court, asserting that the decision of the Supreme Court of Pennsylvania should be reversed because:

> 1. The presence of 13 ex-officio delegates to the convention deprived Pennsylvania residents of the equal protection of the laws.

8. Reprinted at pp. 1a-27a of the Jurisdictional Statement.

2. The new Pennsylvania Judiciary Article makes the jurisdiction of the Pennsylvania courts "subject to the will of the legislature" and is, therefore, contrary to the doctrine of separation of powers.

3. The procedure followed in adding the new Judiciary Article was contrary to the amendment procedure specified in the Pennsylvania Constitution.

We submit that these contentions are patently frivolous, that they do not present any substantial federal questions and that the appeal should be dismissed at the earliest possible moment.

Argument.

A. The Appeal Should Be Dismissed at the Earliest Possible Moment.

In the public interest, and in the interest of orderly administration of justice in the Commonwealth of Pennsylvania, there should be a prompt disposition of this challenge to Pennsylvania's new Judiciary Article.

In conformity with the time schedule specified in the new Judiciary Article of the Pennsylvania Constitution, the new Article went into effect on January 1, 1969. Many of its provisions have already been implemented and others are in the process of implementation. Unification and centralization of the Pennsylvania court system have now been accomplished. Pennsylvania's Orphans' Courts, Courts of Oyer and Terminer and General Jail Delivery, Courts of Quarter Sessions, the County Court of Philadelphia, the County Court of Allegheny County, and the Juvenile Court of Allegheny County have been abolished; the powers previously vested in these courts have now been placed in Courts of Common Pleas in each County. The Magistrates' Courts of Philadelphia have been replaced by a Traffic Court and a Municipal Court. The number and boundaries of new magisterial districts have been created throughout the Commonwealth. A Court Administrator has been appointed by the Supreme Court and has taken office. A Commonwealth Court is in the process of creation. A Judicial Inquiry and Review Board has been established and various other procedures mandated by the new Constitutional provisions have been put into effect. At the November 1969 election, a number of judges will come up for re-election on a merit basis.

The present case hangs as a cloud over all of these activities. It is imperative that it be disposed of as promptly as possible. If the new Judiciary Article is declared invalid, all of the steps that have been taken must somehow be undone and a reversion to the former constitutional provisions must take place. If we are correct in our contention that there is no substantial federal question presented by this case, public interest demands that there be a prompt dismissal of this appeal.

B. The Appeal Should Be Dismissed for Want of a Substantial Federal Question.

None of the issues raised by appellant presents a substantial federal question.

1. "Ex Office Delegates" (Jurisdictional Statement pp. 13-15).

Relying on **Baker v. Carr**, 369 U. S. 186 (1962), and its progeny,[9] appellant asserts that the presence of 13 ex-officio delegates at the Pennsylvania Constitutional Convention deprived Pennsylvania residents of the equal protection of the laws. The contention has no merit at all.

The teaching of **Baker v. Carr** and the other cases cited by appellant is that a State, in a statewide election, may not weigh the vote of one elector, or one class of electors, more heavily than the vote of any other elector, or class of electors. See *e.g.*, **Gray v. Sanders**, 372 U. S. 368, 379-80 (1963). But there is nothing in any of those cases that compels a State to provide for popular election of all of its public officials, or all of its legislators, or all of its constitutional convention delegates. As this Court noted in **Fortson v. Morris**, 385 U. S. 231, 233 (1966), the cases relied upon by

9 **Gray v. Sanders**, 372 U.S. 368 (1963); **Wesberry v. Sanders**, 376 U.S. 1 (1964); **Reynolds v. Sims**, 377 U.S. 533 (1964); **Lucas v. Colorado General Assembly**, 377 U.S. 713 (1964).

plaintiff were not "intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly". In **Fortson,** the Court held that "there is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor." *Id.* at p. 234. Similarly, there is nothing in the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select delegates to a constitutional convention.

In the area where **Baker v. Carr** and its progeny are apposite, there was clearly no violation. At the May 1967 primary, where the calling of the Convention and its makeup were approved, each elector's vote had the same weight as the vote of every other elector in the State. At the November 1967 election, when district delegates were elected, each elector's vote carried the same weight as the vote of every other elector in the district.[10] And at the April 1968 primary election, when the Convention's proposals were approved, each elector's vote carried the same weight as the vote of every other elector in the State. The concept of "one man, one vote" was adhered to fully.

2. "Judicial v. Legislative Supremacy" (Jurisdictional Statement pp. 15-17).

Without citing a single decision of this Court, appellant argues that the new Judiciary Article deprives Pennsylvania residents of "rights * * * guaranteed by the Fourteenth Amendment of the United States Constitution" by somehow making the jurisdiction of the Pennsylvania Courts "subject to the will of the Legislature".

10. There is no contention that the districts were improperly apportioned.

This contention must fail for a number of reasons.

In the first place, the contention has not been properly raised. Nowhere in the proceedings in the State courts did appellant ever contend that the asserted shift of power from the judiciary to the legislature raised a federal question. "It is too late, of course, to raise the federal question for the first time in the notice of appeal to the Supreme Court or in the Jurisdictional Statement. Such papers are not part of the record of the state court proceedings and it is that record which must affirmatively show a raising of the federal issue." **Stern & Gressman, Supreme Court Practice** p. 99 (3d ed. 1962). The argument having not been made by appellant in the Pennsylvania courts and having not been actually decided by the Supreme Court of Pennsylvania, it cannot be entertained here. **Beck v. Washington**, 369 U. S. 541, 553-54 (1962).

Secondly, appellant's contention that there is a redistribution of power provided in the new Judiciary Article is based on a strained interpretation of the language of that article, an interpretation which the Supreme Court of Pennsylvania expressly refused to follow. As the Supreme Court of Pennsylvania noted in its opinion, the new Judiciary Article keeps the judicial powers of the Commonwealth in the courts; it specifically provides that "the judicial power of the Commonwealth shall be vested in a unified judicial system", that the Supreme Court "shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth", that "the Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace", and that "the Supreme Court shall have the power to prescribe general rules governing practice, procedure, and the conduct of all courts". The fact that there are certain provisions in the new Judiciary Article relating to

jurisdiction of the courts which utilize language like "until otherwise provided by law" certainly does not, as appellants would have it, make the jurisdiction of the Pennsylvania courts "subject to the will of the Legislature".

Third, and finally, is the fact that even if the question were properly raised and even if the new Judiciary Article did subject the Pennsylvania Judiciary to the will of the Pennsylvania legislature, the question appellant seeks to raise is clearly precluded by prior decisions of this Court:

> "* * * The State has a wide discretion in respect to establishing its systems of courts and distributing their jurisdiction * * *". **Ohio v. Akron Park District,** 281 U. S. 74, 81 (1930).

> "* * * A state may, of course, distribute the functions of its judicial machinery as it sees fit. * * *" **Byrd v. Blue Ridge Rural Electric Cooperative,** 356 U. S. 525, 536 (1958).

> "* * * Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty. 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and

distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.' Story's Const. (5th ed.) 393. Again: 'Indeed, there is not a single constitution of any State in the Union, which does not practically embrace some acknowledgement of the maxim, and at the same time some admixture of powers constituting an exception to it.' Story's Const. (5th ed.) 395." **Dreyer v. Illinois**, 187 U. S. 71, 84 (1902). See also **Carfer v. Caldwell**, 200 U. S. 293, 297 (1906).

Accordingly, it is clear that appellant's contention that Pennsylvania's new Judiciary Article is violative of the concept of separation of powers raises no substantial federal question.

3. "Abrogation of Pennsylvania Constitutional Protections" (Jurisdictional Statement pp. 17-20).

Appellant argues that the procedure followed in amending the Constitution was violative of certain provisions of the Pennsylvania Constitution of 1874. The Supreme Court of Pennsylvania has held to the contrary. Obviously, the question of interpreting the Pennsylvania Constitution is a matter for the Supreme Court of Pennsylvania, not this Court. "* * * [T]he courts of the State are the appropriate tribunals for the vindication of the state constitution and laws." **Carfer v. Caldwell**, 200 U. S. 293, 297 (1906). "* * * Whether state statutes shall be construed one way or another is a state question, the final

decision of which rests with the courts of the State. * * *" **Hebert v. Louisiana**, 272 U. S. 312, 316 (1926). See also **Chicago, M. St. P. & Pac. R. R. v. Risty**, 276 U. S. 567, 570 (1928); **Winters v. New York**, 333 U. S. 507, 514 (1948).

CONCLUSION.

It is obvious that the instant appeal raises no substantial federal questions. The appeal should be dismissed.

Respectfully submitted,

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